

IN THE SUPREME COURT OF FLORIDA

INQUIRY CONCERNING
A JUDGE NO. 02-487

Supreme Court Case
No.: SC03-1171

**RESPONDENT'S MOTION IN LIMINE TO
EXCLUDE TESTIMONY OF JEFFREY DOWNING
AND SUPPORTING MEMORANDUM OF LAW**

The Honorable Gregory P. Holder ("Judge Holder" or "Respondent"), by counsel, files with the Hearing Panel of the Florida Judicial Qualifications Commission ("the Panel") this Motion in Limine to Exclude Testimony of Jeffrey Downing and Supporting Memorandum of Law ("Motion").

1. Downing is an Assistant United States Attorney for the Middle District of Florida.

2. On December 8, 2003, Judge Holder's counsel requested permission from the United States Department of Justice ("DOJ") to depose Downing.¹ Similarly, on December 15, 2003, the Judicial Qualifications Commission ("JQC") requested permission, from DOJ, to allow Downing to testify at the final evidentiary hearing. *See Exhibit 1.*

¹ Downing is noticed for deposition before the expiration of the discovery cutoff. At this time, Judge Holder is unsure if Downing's scope of testimony will be expanded. Therefore, Judge Holder is filing this motion to preserve his objection. If appropriate, a supplemental memorandum will be filed to update the Panel following Downing's deposition.

3. A DOJ employee may only testify to those “facts” or areas of inquiry which are pre-approved by the responsible U.S. Attorney. 28 C.F.R. §§ 16.21 *et. seq.*

4. Acting under the authority of 28 C.F.R. §§ 16.21 *et. seq.*, the United States Attorney for the Middle District of Florida, Paul I. Perez (“Perez”), imposed restrictions on the nature and extent of the testimony which Downing is authorized to provide. *See* Exhibit 2.

5. These restrictions limit Downing’s testimony solely to those facts that the JQC seeks to establish; *i.e.*, the identification of the documents provided to the JQC, and nothing more. *See* Florida Judicial Qualification Commission’s Prehearing Statement, filed August 25, 2004.

6. The Panel does not have the authority to compel Downing to exceed the scope of the testimony set forth by Perez. *See State v. Tascarella*, 580 So. 2d 154 (Fla. 1991).

7. To allow Downing to testify only to those topics enumerated by Perez violates Judge Holder’s due process rights and is highly prejudicial to Judge Holder’s defense.

8. Finally, under Section 90.403, Florida Statutes, the prejudicial nature of the evidence outweighs any probative value.

This motion seeks to exclude all testimony of Downing at the Final Hearing. The grounds upon which this Motion is based are set forth below in the supporting Memorandum of Law.

MEMORANDUM OF LAW

I. BACKGROUND

Assistant United States Attorney Jeffrey John Del Fuoco (“Del Fuoco”) alleges that in early 2002 an unmarked envelope was anonymously placed under his office door at the United States Army Reserve Headquarters in St. Petersburg. *See id.* Del Fuoco claimed that the envelope contained a typewritten note with words to the effect:

I thought you would be interested in this or something should be done about this.

See id. The note was signed “A concerned citizen” or “A concerned taxpayer”. *See id.* Along with the note was an alleged copy of the Air War College (“AWC”) paper that Judge Holder had submitted to the AWC four years (now almost seven years) earlier; *i.e.*, the purported Holder paper (“PHP”). Also included was a copy of the paper authored by David Hoard (the “Hoard paper”), the paper from which Judge Holder allegedly plagiarized. *See id.*

For unexplained reasons, the Assistant United States Attorneys’ Office waited almost a year before forwarding the documents. *See id.* *See Affidavit of*

Jeffrey J. Del Fuoco. Ultimately, in January 2003, Downing provided the Del Fuoco documents to the Air Force and the JQC advising that it appeared that a significant portion of the PHP had been copied verbatim, or substantially verbatim, from the Hoard paper. As a result, the Air Force instituted an investigation to determine if Judge Holder had:

- 1) plagiarized the paper submitted to the AWC in 1998; and
- 2) made a false statement when he certified that the paper he submitted was his original work.

Following the completion of the Air Force's investigation, on December 19, 2003, Major General Fiscus, The Judge Advocate General of the Air Force, having fully considered all of the evidence, restored Colonel Holder's designation as a Judge Advocate.

On July 16, 2003, the JQC filed a Notice of Formal Charges (the "Charges") asserting that probable cause existed to institute formal proceedings against Judge Holder to determine whether Judge Holder had:

- 1) plagiarized a paper submitted to the MacDill Air Force Base AWC in 1998; and
- 2) made a false statement when he certified that the paper he submitted was his original work.

These charges rest solely upon the documents forwarded to the JQC by Downing and which were provided to Downing by Del Fuoco.

On December 8, 2003, Judge Holder's counsel requested permission from the United States Department of Justice ("DOJ") to depose Downing. Similarly, on December 15, 2003, the JQC requested permission from the DOJ to allow Downing to testify at the final evidentiary hearing. *See* Exhibit 1. In response, on December 18, 2003, United States Attorney Paul I. Perez ("Perez") authorized the deposition, as well as the testimony at the final hearing, but restricted Downing's testimony to the following:

- 1) to identify copies of the alleged plagiarized paper;
- 2) to identify copies of the paper written by Lieutenant Colonel Hoard from which the plagiarized material was taken; and
- 3) to identify the letter dated December 20, 2002 referring the matter to the Judicial Qualifications Commission.

See Exhibit 1.

II. APPLICABLE LAW

The restrictions placed on the scope of Downing's testimony are unreasonably narrow, and they result in extreme prejudice to Judge Holder's defense.

A. Judge Holder a federal and Florida due process right to fully cross-examine any witness presented by the JQC.

Downing's testimony is crucial to this proceeding. The origin of all charges against Judge Holder stem from documents forwarded to the JQC by Downing, and

which were provided to Downing by Del Fuoco. The scope of testimony determined by Perez specifically limits Downing's testimony to the identification of the documents which form the basis of this matter, *i.e.*, those facts that the JQC seeks to establish. Perez's restrictions do not accommodate Judge Holder's right to cross-examine Downing. This effectively precludes Judge Holder from confronting the witness that has provided the JQC with the primary, if not sole, evidence that forms the basis of the charges against him.

In a similar proceeding,² the Florida Supreme Court held that confrontation, cross-examination, and a fair trial are essential ingredients of due process. *Sheiner v. State*, 82 So.2d 657 (Fla. 1955); *Petition for Revision of, or Amendment to, Integration Rule of the Florida Bar*, 103 So.2d 873 (Fla. 1956). Confrontation and cross-examination under oath must be afforded to protect Judge Holder's due process rights because they are the only methods to test the probity of the evidence and discredit or eliminate what is spurious or of doubtful veracity. *See id.*

Should Downing testify at trial, Judge Holder will be prevented from questioning Downing regarding, among other things, the following:

- 1) the envelope and letter that purportedly accompanied the PHP and Hoard paper found by Del Fuoco, which apparently are now missing;

² The principles enunciated in disciplinary cases relating to attorneys are applicable to a degree in judicial discipline cases. *In Re Boyd*, 308 So.2d 13 (Fla. 1975), *superseded on other grounds*, 357 So.2d 152.

- 2) actions taken by Downing upon being provided with the documents discovered by Del Fuoco in early 2002 and October 2003;
- 3) the chain of custody of the documents after they were discovered by Del Fuoco;
- 4) actions taken by Downing once the documents were in his possession, including his involvement in providing information to the JQC; and
- 5) Downing's discussions, or other communications, with Del Fuoco and others relating to the documents.

Without the opportunity to fully cross-examine Downing, Judge Holder is left with no way to test the veracity of Downing's testimony; test Downing's recollection of the events concerning his receipt of the documents; identify any bias that Downing may have; and assure that the integrity of the documents was properly maintained from when they were found until they were finally provided to the JQC. In short, to prevent Judge Holder from cross-examining Downing violated Judge Holder's federal and Florida right to due process rights.

B. The scope of testimony authorized by Perez is so narrow that it is tantamount to a denial of Judge Holder's request to depose Del Fuoco.

The Florida Rules of Civil Procedure allow discovery of any matter relevant to the subject matter of the pending action. Fla. R. Civ. P. 1.280. The Rules do not limit the subject matter of a deposition to those things that the deponent, or in this

case his employer, feels are relevant. If a party exceeds the scope of permissible discovery, the Florida Rules of Civil Procedure have a procedural safeguard. *See id.* By moving for a protective order, a party can have the Panel review and limit the discovery requests to topics the Panel decides are relevant. In this case, Perez has made that decision for the Panel and defined the scope of relevant testimony by Downing. Judge Holder's topics of inquiry outlined above lie squarely within the realm of permissible discovery. Perez, acting in his capacity as a United States Attorney, has limited the scope of permissible discovery by Judge Holder and prevented him from conducting a meaningful examination of Downing.

Where a federal agency will not allow its employee to be deposed, the Florida Supreme Court held that exclusion of all testimony is appropriate. *State v. Tascarella*, 580 So.2d 154 (Fla. 1991). In *State v. Tascarella*, several Department of Justice ("DOJ") employees were noticed for deposition. The DOJ instructed its employees not to attend the depositions. The trial court excluded all trial testimony of the DOJ employees, and the State appealed. Because Tascarella "would be prejudiced if forced to confront these witnesses at trial without pretrial discovery," the Florida Supreme Court agreed that exclusion of the DOJ employees' testimony was proper. *Id.*

The facts of this instant case are even more compelling than those of *Tascarella*. In *Tascarella*, the DOJ witnesses were prohibited from attending their

depositions. This resulted in neither Tascarella nor the State being able to depose the witnesses prior to trial. However, in the instant case, the DOJ agreed to allow Downing to be deposed pursuant to a scope of examination engineered by Perez — a scope that includes only those facts the JQC needs to elicit from Downing. From the JQC's standpoint, any testimony from Downing, other than his identification of the documents that are the basis of the charges against Judge Holder, is unnecessary. It is Judge Holder, and Judge Holder alone, who needs to exceed the scope of the testimony determined by Perez. To allow the JQC and DOJ to orchestrate such testimony and to exercise control over the scope of the defense would be inconsistent with due process and clearly contrary to the Florida Supreme Court's opinion in *Tascarella*.

Because the limits imposed by Perez impermissibly restrict the scope of Downing's testimony, this Panel must exclude his testimony, in its entirety, at the Final Hearing.

WHEREFORE, Judge Holder respectfully requests that the Panel grant his Motion in Limine and exclude all testimony and affidavits of Downing at the final hearing.

Dated: August 25, 2004

Respectfully Submitted,



David B. Weinstein, Esq.
Florida Bar Number 604410

Bales Weinstein
Post Office Box 172179
Tampa, Florida 33672-0179
Telephone No.: (813) 224-9100
Telecopier No.: (813) 224-9109

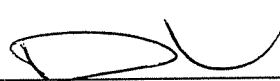
-and-

Juan P. Morillo
Florida Bar No.: 0135933
Sidley Austin Brown & Wood LLP
1501 K Street, N.W.
Washington, D.C. 20005
Telephone: (202) 736-8000
Telecopier: (202) 736-8711

Counsel for Judge Gregory P. Holder

CERTIFICATE OF SERVICE

I certify that on August 25, 2004, a copy of the foregoing has been served by telecopier to: Ms. Brooke Kennerly, Hearing Panel Executive Director, 1110 Thomasville Road, Tallahassee, FL 32303; Honorable John P. Kuder, Chairman of the Hearing Panel, Judicial Building, 190 Governmental Center, Pensacola, FL 32501; John Beranek, Counsel to the Hearing Panel, Ausley & McMullen, P.O. Box 391, Tallahassee, Florida 32302; Charles P. Pillans, III, Esq., JQC Special Counsel, Bedell Ditmar DeVault Pillans & Coxe, P.A., The Bedell Building, 101 East Adams Street, Jacksonville, FL 32202; and, Thomas C. MacDonald, Jr., JQC General Counsel, 1904 Holly Lane, Tampa, FL 33629.



Attorney

BALES • WEINSTEIN
ATTORNEYS AT LAW

JOHN CALHOUN BALES
CRAIG P. CLENDINEN
SCOTT DISTASIO
WILLIAM L. DUNKER
DANIEL P. FERNANDEZ
VIRGINIA Z. HOUSER
KIMBERLY STAFFA MELLO
GEOFFREY PARMER
JOHN D. SHOFI
DAVID B. WEINSTEIN
KENNETH C. WHALEN

A BALES WEINSTEIN
PROFESSIONAL ASSOCIATION
COURTHOUSE PLAZA
625 E. TWIGGS ST., SUITE 100
TAMPA, FLORIDA 33602
TELEPHONE (813) 224-9100
FACSIMILE (813) 224-9109

MAILING ADDRESS:
P.O. Box 172179
TAMPA, FL 33672-0179

PRIVILEGED AND CONFIDENTIAL

December 8, 2003

James R. Clindt, Esq.
First Assistant U. S. Attorney
Department of Justice
300 N. Hogan Street, Suite 700
Jacksonville FL 32202-4270

VIA FACSIMILE (904) 301-6310
AND FEDERAL EXPRESS

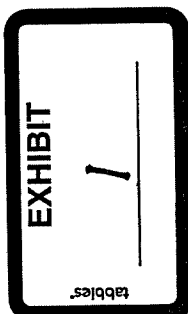
Re: Before The Florida Judicial Qualifications Commission
Inquiry Concerning a Judge No. 02-487
Supreme Court Case No.: SC03-1171

Deposition Subpoenae for Jeffrey J. Del Fuoco and Jeffrey S. Downing

Dear Mr. Clindt,

I have been referred to you in the course of to my conversations on Friday afternoon, December 5, 2003, with Warren Zimmerman and Gregory W. Kehoe, both of whom are familiar with the above-referenced matter involving Judge Gregory P. Holder. The JQC has authorized issuance of subpoenae for the above-referenced federal employees. As you can see in the attached document, the JQC, through Charles Pillans, indicated that it intended to call Mr. Del Fuoco as a witness. As yet, it has not noticed him for deposition. Mr. Pillans is agreeable to December 16 or 17 in Tampa. The discovery cut off is December 17, 2003, as the final evidentiary hearing is scheduled for January 20, 2004.

After my review of the relevant sections of the Code of Federal Regulations I can state that the subject matter of the deposition does not involve an issue under investigation by the Department. Mr. Del Fuoco's testimony is sought regarding actions performed in his status as a member of the United States Army reserve corps and his participation in the separate Air Force and JQC investigations.



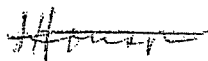
James R. Clindt, Esq.
First Assistant U. S. Attorney
Department of Justice
December 8, 2003
Page 2

No information relating to or based upon material contained in the files of the Department of Justice or information acquired as part of the performance of Mr. Del Fuoco's duties is sought. Nothing in his testimony would bring to bear any of the matters barring such testimony as set forth in Title 28 CFR § 16.23(b). Similarly, Mr. Downing's limited participation can be gleaned from the documentation attached to this correspondence.

I will contact your office tomorrow morning to discuss this matter in further detail.

Thank you for your attention to this matter.

Very truly yours,



Virginia Zock Houser

cc: Warren Zimmerman, Esq.
Gregory W. Kehoe, Esq
Lt. Col. Lauren Naumann-Johnson, USAF

Main Office
400 North Tampa Street, Suite 3200
Tampa, Florida 33602
813/274-6000
813/274-6200 (Fax)

2110 First Street, Suite 3-137
Port Myers, Florida 33901
239/461-2200
239/461-2219 (Fax)



U.S. Department of Justice
United States Attorney
Middle District of Florida

300 North Hogan Street, Suite 700
Jacksonville, Florida 32202-4270
904/301-6300
904/301-6310 (Fax)

80 North Hughes Avenue, Room 201
Orlando, Florida 32801
407/648-7500
407/648-7643 (Fax)

Reply to: Jacksonville, Florida

PIP/rgd

via Facsimile and U.S. Mail

December 18, 2003

Charles P. Pillans, III, Esq.
Bedell, Dittmar, DeVault, Pillans & Cox. P.A.
101 East Adams Street
Jacksonville, Florida 32202
Fax: (904) 353-9307

Re: JOC Inquiry No. 02-487

Dear Mr. Pillans:

This is in response to your letter of December 15, 2003 to AUSA Jeffrey S. Downing. Pursuant to the provisions of 28 C.F.R. §§ 1621 et seq., I am authorizing AUSA Downing, AUSA Jeffrey Del Fuoco and AUSA Kenneth Lawson to give testimony at a Judicial Qualifications Commission Hearing scheduled to begin January 20, 2004 in Tampa in regards to the following limited areas:

1. to identify copies of the alleged plagiarized paper;
2. to identify copies of the paper written by Lieutenant Colonel Hoard from which the plagiarized material was taken;
3. to identify the letter dated December, 20, 2002 referring the matter to the Judicial Qualifications Commission;
4. as to AUSA Del Fuoco only, to identify the documents he received from AUSA Lawson which bear date stamps numbers KELjd1 -KELjd 71; and
5. as to AUSA Lawson only, to identify the papers which he gave to AUSA Del Fuoco.

This authority does not extend to any questions directed to AUSA Downing or AUSA Del Fuoco "to explain briefly the investigation by the U.S. Attorneys Office, specifically, the beginning and ending dates that the file was open." It is the policy of this Office neither to confirm or deny the existence of an investigation.

Very truly yours,

PAUL I. PEREZ
United States Attorney

Main Office
400 North Tampa Street, Suite 2200
Tampa, Florida 33602
813/274-6000
813/274-6200 (Fax)

2110 First Street, Suite 3-137
Fort Myers, Florida 33901
239/461-2200
239/461-2219 (Fax)



U.S. Department of Justice
United States Attorney
Middle District of Florida

300 North Hogan Street, Suite 700
Jacksonville, Florida 32202-4270
904/301-6300
904/301-6310 (Fax)

80 North Hughes Avenue, Room 201
Orlando, Florida 32801
407/648-7500
407/648-7643 (Fax)

Reply to: Jacksonville, Florida

PIP/rgd

via Facsimile and U.S. Mail

December 18, 2003

Virginia Z. Houser, Esq.
Bales, Weinstein, P.A.
625 E. Twiggs St., Suite 100
Tampa, Florida 33602
Fax: (813) 224-9109

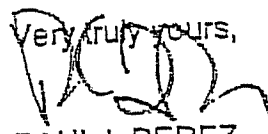
Re: JOC Inquiry No. 02-487

Dear Ms. Houser:

This is in response to your letter of December 8, 2003 to First Assistant United States Attorney James R. Klindt. You have asked for authority to depose AUSA Jeffrey Del Fuoco and AUSA Jeffrey Downing in the referenced Florida Judicial Qualifications Commission matter. While you have not specified your areas of inquiry, you represent that it is being conducted pursuant to the provisions of 28 C.F.R. §§ 1621 et seq.

This letter authorizes the depositions of AUSA Del Fuoco and AUSA Downing but only as to those matters contained in items 1 through 5 of my December 18, 2003 letter to Mr. Charles Pillans.

Very truly yours,


PAUL I. PEREZ
United States Attorney

cc: Charles P. Pillans, Esq.

